

No. 1000

IN THE
Supreme Court of the United States

PHILADELPHIA AND READING RAILWAY COMPANY,
Petitioner,

vs.
MARIA DOMINGA RODRIGUEZ, Respondent.

PETITION FOR WRIT OF HABEAS CORPUS, CERTIORARI, AND WRIT OF HABEAS CORPUS,
AND BRIEF IN SUPPORT OF PETITION.

GEORGE OWEN PARRY,

Counsel for Respondent,
615 Market Street,
Philadelphia, Pa.

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In the Supreme Court of the United States.

OCTOBER TERM, 1920. No. .

Philadelphia and Reading Railway Company, Petitioner,

vs.

Maria Domenica DiDonato, Respondent.

MARCH 20, 1920.

SIRS:—Please take notice that upon the annexed petition of Philadelphia and Reading Railway Company, a certified copy of the entire transcript of the record of this cause, including the proceedings in the Supreme Court of Pennsylvania, submitted herewith, and the petitioner's brief, also to be submitted upon the presentation of the petition, an application will be made to the Supreme Court of the United States, at a term of said Court, appointed to be held at the Capitol, Washington, D. C., on Monday, the fifth day of April, 1920, at the opening of the Court on that day, or as soon thereafter as counsel can be heard, for a writ of *certiorari* to be directed to the Supreme Court of the State of Pennsylvania, to review the decree or judgment of said Court, rendered in the above cause on the twenty-third day of February, 1920, which affirmed the decree or judgment of the Com-

mon Pleas No. 1 of Philadelphia County, Pennsylvania, entered in said Court on the twenty-fourth day of February, 1919, upon an award of the Workmen's Compensation Board of Pennsylvania, in favor of Maria Domenica DiDonato, the respondent, for the sum of \$5173.05.

Dated at Philadelphia, March 20th, 1920.

GEORGE GOWEN PARRY.

Counsel for Petitioner,

415 Reading Terminal, Philadelphia, Pa.

To Messrs. Evans, Forster & Wernick, Counsel for Respondent, Bailey Building, Philadelphia, Pa.

In the Supreme Court of the United States.

OCTOBER TERM, 1920. No. .

Philadelphia and Reading Railway Company, Petitioner,

VS.

Maria Domenica DiDonato, Respondent.

TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES:

Philadelphia and Reading Railway Company, in support of this, its petition for a writ of *certiorari* to be directed to the Supreme Court of the State of Pennsylvania to review a decree of judgment rendered on the twenty-third day of February, 1920, which affirmed the judgment of the Court of Common Pleas No. 1 of Philadelphia County, Pennsylvania, entered on the twenty-fourth day of February, 1919, upon an award of the Workmen's Compensation Board of Pennsylvania, affirming an award of the Compensation Referee in favor of Maria Domenica DiDonato, for the sum of \$5173.05, respectfully shows:—

1. That this action was begun by petition under the Workmen's Compensation Act of the State of Pennsylvania, filed by Maria Domenica DiDonato, dependent

widow of Pasquale DiDonato, claiming an award of compensation for the accidental death of her husband, which occurred while in the course of his employment as a crossing watchman of the Philadelphia and Reading Railway Company.

2. That the defendant, your petitioner, duly filed its answer to the said petition, denying liability under the Workmen's Compensation Act of Pennsylvania for the said accident, on the ground that the said Donato was engaged with the defendant in interstate commerce at the time he was injured.

3. That the record, a certified copy of which is presented herewith, shows that there is no conflict of evidence, the claimant relying solely upon the ground that the undisputed facts compelled the legal conclusion that there was not an engaging in interstate commerce.

4. That the record shows that Donato was a crossing watchman employed by your petitioner at the grade crossing formed by the intersection of the main line of its railroad with Forrest Street in the Borough of Conshohocken, Pa. This crossing was protected by safety gates, operated by the watchman, who was also provided with lanterns, flags and a signal disc for signalling purposes.

The Compensation Referee found that, while acting in the course of his employment in flagging a train over this crossing, Donato was struck by another train and instantly killed; that interstate shipments and trains constantly pass over this crossing, but there was no proof as to the character of the particular train which the decedent was flagging when he was killed.

5. An award of compensation was made by the Referee, which was affirmed by the Compensation Board, whose decree was affirmed by the judgment of the Court of Common Pleas. From this judgment, the defendant

appealed to the Supreme Court of Pennsylvania, which dismissed the appeal and affirmed the judgment of the Court of Common Pleas in favor of the claimant.

6. That the questions of law for determination by the Compensation Referee were as follows:—

(a) Is a watchman employed on an interstate railroad at a grade crossing over which interstate shipments and trains constantly pass, engaged in interstate commerce within the meaning of the Federal law, while performing his duties in flagging trains over the crossing?

(b) Since in an action brought under the Workmen's Compensation Act of Pennsylvania, the burden is upon the claimant to prove a case within the Act, was a *prima facie* case made out by proof that claimant's husband was employed as a crossing watchman by a common carrier by rail and that he was injured while engaging in the commerce conducted by the carrier over the tracks at the crossing?

7. That the claimant proved, by the only person who saw the accident, that the decedent was struck by a train while flagging another train but there was no proof and no finding by the Referee to show the identity of the train which the watchman was flagging. The Referee held that the claimant was entitled to an award of compensation under the Workmen's Compensation Law of Pennsylvania, because the defendant was unable to show that an unidentified and unknown train was of interstate character.

8. The Workmen's Compensation Board in affirming the award of the Referee, said:—

"We hold, therefore, that this watchman, while in the course of his employment, met his death while flagging the train whose character has been undisclosed by the testimony. We rule that the burden of proving its defense was upon the defendant and sustain the

Referee in his finding that this burden has not been met."

The Court of Common Pleas and the Supreme Court of Pennsylvania held that the burden was upon the defendant to show that the case did not fall within the provisions of the State Compensation Law; and furthermore held that the burden had not been met by proof that the crossing tracks were constantly in use by interstate trains and that the watchman's duties were to protect the crossing tracks from the risk of collision between traffic upon the railway and traffic upon the public highway.

9. That, although there is no finding whatever as to the character of the train which was being flagged over the crossing, the decisions below proceed upon the presumption that an intrastate train was approaching, for the Supreme Court of Pennsylvania expressly holds that had it been an interstate train, the watchman would have been engaged in interstate commerce.

10. If the Supreme Court of Pennsylvania was right in holding that a crossing watchman is engaged in interstate commerce only when flagging an interstate train, then the fundamental question for decision was the character of the train; for the State Statute could only be applicable if it was an intrastate train. In the face of the finding that the character of the train was not disclosed by the testimony, the judgment of the Supreme Court of Pennsylvania has no foundation of fact upon which to rest, and it was error for that Court to base its decision upon a presumption that the train in question was an intrastate train. Your Honorable Court has repeatedly held that a Federal right is denied as the result of a finding of fact without evidence to support it, but in this case a finding involving the conclusion of law that Donato was engaged in intrastate commerce is expressly stated by the tribunals below to be based on an utter lack of proof on the subject.

11. That the Workmen's Compensation Act of Pennsylvania creates a special jurisdiction in derogation of the common law, and in this proceeding under that Act, where the jurisdiction was challenged, it was incumbent upon the claimant to prove *prima facie*, a case within the Act.

12. That the Supreme Court of Pennsylvania erred in holding that the claimant made out a *prima facie* case by showing, *inter alia*, that her decedent was employed as a crossing watchman and met with an accident in the State while in the course of his employment in flagging trains over the crossing, for the claimant was not entitled to the benefit of the State law unless she further showed that the commerce in which the decedent and his employer were engaged, was intrastate commerce or at least identified the train sufficiently to enable the defendant to ascertain its character.

13. That the decision of the Supreme Court of Pennsylvania subverts the fundamental theory of the law for its result is, not only to relieve the claimant of the necessity of making essential proof, but to effectually deprive the defendant of the protection of the Act of Congress invoked. For proof of the character of an unknown train is obviously impossible to make.

14. That this decision is not in concord with the decisions of this Honorable Court, which has repeatedly held that, in cases where a Federal right is affected, the question of the burden of proof is not one of mere State procedure, but is a matter of substance, subject to review by your Honorable Court.

15. That upon a question herein involved, the highest Courts of the States of California and of Illinois have reached a different conclusion from the Supreme Court of Pennsylvania, and have held that a crossing watchman on an interstate railroad is engaged in interstate commerce, irrespective of the character of an approaching train, with

which he is immediately concerned, as his duties embrace the prevention of collisions upon the crossing and thereby tend to the maintenance and the good order of the tracks, which are instrumentalities used by the carrier in the transportation of goods in interstate commerce.

16. That your petitioner is advised that this question has not been passed upon by your Honorable Court and that, in view of the conflict of authority in the State courts, there is created confusion and uncertainty with regard to the application of the Federal Law and doubt concerning the rights and obligations of employers of labor which ought not to exist.

17. That certain other like cases are pending in the Compensation tribunals and courts of the State of Pennsylvania, and it therefore follows that, unless this Court shall correct the errors of the Court below, your petitioner will be deprived of a right, privilege and immunity under the Federal Employers' Liability Act, in this and all similar cases brought hereafter in the State of Pennsylvania.

Wherefore your petitioner prays that a writ of *certiorari* may issue out of and under the seal of this Court, directed to the Supreme Court of Pennsylvania, commanding that Court, to certify the case to this Court for review and determination, as provided in the Act of Congress known as the Judicial Code, or that your petitioner may have such other and further relief in the premises as to this Court may seem appropriate and in conformity with the said Act.

And your petitioner will ever pray, etc.

PHILADELPHIA AND READING RAILWAY
COMPANY,

By

AGNEW T. DICE,

President.

[SEAL]

GEORGE GOWEN PARRY,

Counsel for Petitioner.

STATE OF PENNSYLVANIA, }
 COUNTY OF PHILADELPHIA, } ss.

AGNEW T. DICE, being duly sworn, says that he is President of Philadelphia and Reading Railway Company, the petitioner named in the foregoing petition, that he has read the same and knows the contents thereof, and that the facts therein stated are true to the best of his knowledge, information and belief.

AGNEW T. DICE.

Sworn to and subscribed before me this day of
 March, A. D. 1920.

[SEAL]

J. V. HARE,
Notary Public.

My Commission expires March 1, 1923.